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No. 93-18

Supreme Court, U.S.
FILED
JUN 14 1993
OFFICE OF THE CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1993

LELAND AND KARLA SWENSON, *Petitioners*

v.

OGLALA SIOUX TRIBE, *Respondents*

SUPPLEMENTAL APPENDIX

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June, 1993

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TABLE OF CONTENTS

SUPPLEMENTAL APPENDIX

Memorandum Decision and Order of the District Court, Third Judicial District, Canyon County, Idaho, dated July 24, 1991 4

Findings of Fact, Conclusions of Law, and Order of the Magistrate Court, Canyon County, Idaho, dated June 7, 1990 5

IN THE DISTRICT COURT
OF THE
THIRD JUDICIAL DISTRICT
OF THE
STATE OF IDAHO,
IN AND FOR THE COUNTY OF CANYON

In the Matter of:	)	Case No. SP-90-00106C
BABY BOY DAVIS,	)	
	)	MEMORANDUM DECISION AND ORDER
A Minor Child.	)	

Baby Boy Davis was born on September 18, 1989, in Healdsburg, California. His mother, Brenda Davis, is not an Indian and at the time of his birth, was unmarried. The man asserted to be the putative father, has been represented to the court as a member of the Oglala Sioux Tribe. He met Davis while living off the reservation. Davis never lived with the putative father and when he learned she was pregnant, he stopped communicating with her and did not provide any assistance, financial or otherwise. Prior to the child's birth, Davis made arrangements for his adoption. She consented to the adoption of the child, but reserved the right to reassert her parental rights if it appeared the putative father or his Tribe would try to obtain custody.

On January 18, 1990, a Petition For Termination Of Parent-Child Relationship was filed in the Magistrates Division of the Third Judicial District Court asking the court to terminate the parental rights of the natural parents and give legal Custody to the Petitioners, Lee and Karla Swenson. Notice of intent to terminate parental rights directed to the putative father and his Tribe, the Oglala Sioux, was filed on January 18, 1990. On February 8, 1990, a hearing was held on the matter which was attended by the Petitioners and a non-lawyer representative of the Indian Child Welfare Center, Caroline Cuny. The putative father, Jeff Not Help Him, did not appear in person.

Cuny advised the court of Not Help Him's intention to object, but stated neither Not Help Him nor the Oglala Sioux Tribe (Tribe) had an attorney representing them. The court continued the matter for thirty days to allow Not Help Him to file a petition to intervene or transfer jurisdiction, and for Not Help Him to secure an attorney. On May 8, 1990, the Tribe was allowed to intervene on its assertion that Baby Boy Davis is an "Indian child" under the Indian Child Welfare Act (ICWA) and that it is the child's tribe. On May 21, 1990, the hearing resumed with the Tribe, the Petitioners, the child, and Not Help Him represented by counsel.

The court heard evidence and argument from each of the parties, except for Not Help Him, who did not appear. Not Help Him's court appointed attorney told the court, despite repeated attempts, she had not communicated with Not Help Him. On June 7, 1990, the court issued its Findings Of Fact, Conclusions Of Law And Order. The court concluded that the Indian Child Welfare Act (ICWA) did not apply in this case because the child was not an "Indian child" as defined in the Act, 25 U.S.C.S. §1903(4); and that grounds for termination, pursuant to Idaho Code §16-2009. were proven by clear and convincing evidence. The court ordered the termination of Not Help Him's parental rights.

On July 16, 1990, the Tribe filed a Notice Of Appeal. The Tribe contends the Magistrate erred 1) in determining the provisions of the ICWA did not apply to the proceeding; 2) by applying an incorrect

standard in finding that the ICWA does not apply to the factual situation of the proceeding; 3) in his conclusions in view of the reliable probative and substantial evidence of the record; and 4) in failing to comply with the standard of proof requirements of the IWCA (sic).

In its Brief, the Tribe limits its argument to two issues: 1) does the ICWA apply to this case, and 2) if the ICWA applies, should the child be placed within his father's tribe in accordance with ICWA placement preferences. An assignment of error unsupported by either cited authority or argument in Appellant's brief will not be reviewed on appeal. Price v. Aztec Ltd., Inc., 108 ID 674, 678, 701 P.2d 294 (1985). Therefore, this Court will confine its discussion to the issues raised in the Tribe's Brief.

In exercising appellate review this Court shall not set aside the trial court's findings of fact unless clearly erroneous. Muniz v. Schrader, 115 Idaho 497, 500, 767 P.2d 1272 (1989). "[C]lear error will not be deemed to exist if the court's findings are supported by substantial and competent, though conflicting evidence." Id. Evidence is regarded "as 'substantial' if a reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact has been proven."

Ortiz v. Dept. of Health & Welfare, 113 Idaho 682, 684, 747 P.2d 91, 93 (Ct.App.1987).

> Where evidence is conflicting, the task of weighing such evidence falls within the province of the trial court. Id. Finally, when a trial court's findings of fact are challenged on appeal, the appellant has the burden of showing error, and reviewing court will review the evidence in a light most favorable to the respondent.

Hugginson v. Westergard, 100 Idaho 687, 604 P.2d 51 (1979); Salazar v. Tilly, supra.Muniz, 115 Idaho at 500

To invoke the requirements of the ICWA there are two prerequisites.

> First, it must be determined that the proceeding

> is a "child custody proceeding" as defined by the Act. Id, §1903 (1). Once it has been determined that the proceeding is a child custody proceed ing, it must then be determined whether or not the child is an Indian child. Id. §1903(4), (9) .

In The Matter Of Appeal In Maricopa County, 136 Ariz 528, 667 P.2d 228, 231 (Ct.App.1983). Here, the proceeding is a child custody proceeding as defined by the Act. See. 25 U.S.C.S. §1903(1) (1983). The determinative issue is whether or not Baby Boy Davis is an "Indian child" as defined by the Act. The ICWA defines "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C.S. §1903(4) (1983). The Tribe contends that Baby Boy Davis is an "Indian child."

In looking at the applicability of the ICWA to a child born out of wedlock the Arizona Court of Appeals in In the Matter of the Appeal In Maricopa County, held that "[b]efore any section of the Act applies, it must be established on the record that the child meets one or both of the definitional criteria; only then does a parent or tribe qualify for 'protection' under the ICWA." (Citation omitted.) Maricopa County, 667 P.2d at 232.

The federal "guidelines for state courts" identify criteria for this determination, giving preference to a determination by the child's asserted tribe. "The determination by a tribe that a child is or is not a member of that tribe, is or is not eligible for membership in that tribe, or that the biological parent is or is not a member of that tribe is conclusive." 44 Federal Register 67584, 67586 (1979). In her affidavit, Joan Decker states "[t]hat your affiant cannot at this time state with certainty tht (sic) Baby Boy Davis is eligible for enrollment with the Oglala Sioux Tribe because his application is incomplete and without the required proof of eligibility, he cannot be enrolled." Petitioner's Exhibit 11. The Magistrate concluded that this determination was costs

conclusive pursuant to the federal guidelines and that the ICWA did not apply. The tribe argues that although the Tribal Enrollment Director was unable to determine the child's eligibility for enrollment because the application was incomplete, an incomplete application is not a determination of ineligibility. Therefore, a conclusive determination has not been made by the tribe, and the child's eligibility should be a question of fact dependent on his actual ancestry. Matter of Adoption of a Child of Indian Heritage, 111 N.J. 192, 543 A.2d 925, 933) (1988). In Matter of Adoption Of A Child Of Indian Heritage, the New Jersey Supreme Court held that since the ancestry of the child in question was in dispute a definitive resolution of his status as an Indian child would require an evidentiary hearing. Id.

The Arizona Court of Appeals in Maricopa County, held that "in the case of a child born out of wedlock to a non-Indian mother, until such time as the putative Indian father acknowledges or establishes paternity the provisions of the ICWA are not applicable. Id., 667 P.2d at 233. Neither the Petitioners nor the Tribe argues that Not Help Him is not the biological father of Baby Boy Davis. In Maricopa County, there also was no serious doubt or dispute as to the biological father of the child at issue. However, the Arizona Court held there must be more than mere speculation of paternity. Id.

In this case, there is no competent evidence in the record that Not Help Him is in fact the child's "parent" as defined by the ICWA. The ICWA defines a "parent" as:

> . . .any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established.

25 U.S.C.S. §1903(9) (1983). No evidentiary hearing was held. The record does not contain an acknowledgement by Not Help Him, an attempt to establish paternity by Not Help Him, or an acknowledgement of Not Help Him's paternity by Davis. In fact, Not Help Him has been

notably absent from these proceedings. His court appointed counsel notified him by letter in February, again in March, and again in April of 1990, of the need for action on his part. The Magistrate in his findings, determined that Not Help Him had abandoned Baby Boy Davis.

The only indication in the record by Not Help Him or Davis of Not Help Him's paternity is a reference to an affidavit made to the tribal enrollment committee contained in an affidavit by Joan Decker, the Oglala Sioux Tribal Enrollment Director. Petitioner's Exhibit 11. The record does not contain sufficient facts regarding Baby Boy Davis' actual ancestry to support the Tribe's contention that they alone provide proof that the child is an "Indian child" for purposes of the ICWA.

The Respondents, Lee and Karla Swenson, argue, and this Court agrees, that the Tribe failed to meet its burden of proving the applicability of the ICWA. The Tribe had notice of the pending action in January 1990, the hearing was held on May 21, 1990. The Tribe had sufficient time to complete Baby Boy Davis' application, or to get sufficient proof of the child's actual ancestry to persuade the court the child was an "Indian child" for purposes of the Act. Although on different grounds, this Court finds the Magistrate's finding that the ICWA did not apply is supported by substantial and competent evidence.

The tribe also argues that Baby Boy Davis should be placed within his father's tribe in accordance with ICWA placement preferences. The Magistrate, upon determining the ICWA did not apply, was under no obligation to act in accordance with ICWA placement preferences. There is substantial and competent, though conflicting, evidence in the record to support the Magistrate's termination of Not Help Him's parental rights and the placement of the child with the Petitioners pursuant to I.C. §16-2009.

Finally, the Respondents request an award of attorney fees pursuant to I.C. §12-121. The Respondents argue this appeal was brought or pursued frivolously, unreasonably, or without foundation. The Respondents point out that the Appellant has not had to bear the expense of the custody proceedings below, but has dramatically increased the costs

for the Respondents by intervening in the case and then failing to prove that it has a legal interest to protect. The Respondent cites the testimony of Cuny, who stated that the Tribe has retained counsel and could afford to pay for its own legal representation. Transcript p.173-174.

Attorney fees are awardable under I.C. §12-121 if the law is well settled, the facts have been found upon substantial evidence, and the Appellant has made no substantial showing that the lower court misapplied the law to those facts. State of Alaska Ex Rel. Sweet v. Hansen, 116 Idaho 927, 929, 782 P.2d 50 (Ct.App.1989). Here, the Tribe has not made any substantial showing that the Magistrate misapplied the law to the facts contained in the record and an award of attorney fees to the Respondent is appropriate.

THIS COURT HEREBY affirms the Findings of Fact, Conclusions Of Law, Judgment And Order entered by the Magistrate on June 7, 1990, and awards the Respondent reasonable attorney fees and costs.

DATED this 24th day of July, 1991.

DENNIS E. GOFF
District Judge

I HEREBY CERTIFY that a true and correct copy of the foregoing Memorandum Decision And Order is forwarded to the following persons on this 25 day of July, 1991.

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CLERK OF THE DISTRICT COURT
T RANDALL
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON MAGISTRATE DIVISION

IN THE INTEREST OF:	)	Case No. SP-90-00106*C
	)	
BABY BOY DAVIS,	)	
	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW
A Minor Child.	)	AND ORDER
	)	
	)	

The above entitled matter having come on for trial on the 21st day of May, 1989, with the petitioners appearing in person and through their attorney, Carolyn Seneca Steele, the above named child did not appear but the attorney for the child Ronald Wilper did appear, Jeff Nothelphim did not appear but he was represented by the Law Office of Van W. Bishop, the Public Defender's Office for Canyon County, Idaho and the Intervenor the Oglala Sioux Tribe, appeared through its attorney, Jeannine Ferguson and the Court having heard the evidence of the parties and the argument of counsel now enters the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That baby boy Davis born September 18, 1989 in Healdsburg, Sonoma County, California is the child of Jeff Nothelphim and Brenda Davis.

2. That baby boy Davis has resided with the petitioners since September 21, 1989 and at the date of the trial resided in Canyon County, Idaho.

3. That Jeff Nothelphim is a member of the Oglala Sioux Indian tribe but the mother is not.

4. Jeff Nothelphim failed to appear at the trial in this matter and despite letters directed to him from the Public Defender's office

he declined to participate. Jeff Nothelphim was served with notice of the petition to terminate his parental rights and of the hearing.

5. Jeff Nothelphim has had no contact with baby boy Davis, has not paid any support for the child, has not sought to have any contact with the child, nor has he paid any of the prenatal or birthing expenses related to the child.

6. Brenda Davis and Jeff Nothelphim were not married and the evidence indicates that the only contact Brenda Davis had with the Oglala Sioux Reservation in Pine Ridge, South Dakota was a visit on Labor Day Weekend in 1988 for a period of four days.

7. Jeff Nothelphim is the father of four other minor children none of which reside on the Pine Ridge Reservation. Those Children being Sara Elizabeth Nothelphim born May 12, 1980, Tyler Nothelphim born, April 20, 1982, Nicholas Nothelphim, born August 15, 1985 and Ryan Nothelphim born November 24, 1986.

8. Neither Jeff Nothelphim nor any of his extended family members have maintained contact with nor attempted to impart any of the Sioux cultural values to any of the children of Jeff Nothelphim. Nor has any member of his family or the Sioux tribe provided any financial assistance to the mother of Tyler, Nicholas and Ryan since her divorce from Jeff Nothelphim. The lack of support and contact by Jeff Nothelphim and his extended family members with Tyler, Nicholas, and Ryan have had detrimental emotional effects on those children.

9. Brenda Davis has consented to the termination of her parental rights and the adoption of Baby Boy Davis by the petitioners.

10. Baby Boy Davis has had no contact with Jeff Nothelphim the extended family of Jeff Nothelphim or any member of the Oglala Sioux Tribe since his birth.

11. Marie Lone Elk is the sister of Jeff Nothelphim. Marie Lone Elk made one attempt in August of 1989 to call Brenda Davis but other than that sole effort the extended family of Jeff Nothelphim made no other effort to inquire about the condition or well-being of Brenda Davis or the child, Baby Boy Davis.

12. Baby Boy Davis has never been in the custody of any person

other than petitioners and the brief custody of Brenda Davis at the hospital.

13. That intervenors were allowed to intervene in this matter pursuant 25 USCS Sec. 1911(c) and I.R.C.P. Rule 24(a) because Baby Boy Davis may have been an Indian Child as defined in the Indian Child Welfare act.

14. That by affidavit of the Oglala Sioux Tribal Enrollment Director, Joan Decker, she stated that the Oglala Sioux Tribe was unable to determine if Baby Boy Davis was a member of the Tribe or eligible for membership in the Tribe.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and jurisdiction of the subject matter as Baby Boy Davis resides in Canyon County Idaho. I.C. Sec. 16-2004 & 16-2006.

2. The provisions of the Indian Child Welfare Act of 1978, 25 U.S.C.S. Sec. 1901, et seq., as to the degree of proof and type of evidence required for the termination of the parental rights of Jeff Nothelphim do not apply to this proceeding.

3. An "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. 25 USCS Sec. 1903(4).

4. The determination by a tribe that a child is or is not a member of that tribe, is or is not eligible for membership in that tribe, or that the biological parent is or is not a member of that tribe is conclusive. Department of the Interior, Bureau of Indian Affairs, "Guidelines for State Courts; Indian Child Custody Proceedings" Sec. B.1(b)(1) as published in the Federal Register, Vol. 44, No. 228, Monday, November 26, 1979.

5. The Oglala Sioux Tribe has declined to find that Baby Boy Davis is either eligible for membership in that Tribe or that Baby Boy Davis is a member of that Tribe. Their determination is conclusive and therefore Baby Boy Davis is not an Indian Child as defined in 25 USCS Sec. 1903(4) and the Indian Child Welfare Act is not applicable to this proceeding.

6. Even if the Oglala Sioux Tribe had determined that Baby Boy Davis was an Indian Child as defined in 25 USCS 1903(4) "A careful study of the legislative history behind the [Indian Child Welfare] Act and the Act itself discloses that the overriding concern of Congress and the proponents of the Act was the maintenance of the family and tribal relationships existing in Indian homes and to set minimum standards for the removal of Indian children from their existing Indian environment. It was not to dictate that an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be, should be removed from its primary cultural heritage and placed in an Indian environment over the express objection of its non-Indian mother." In the Matter of the Adoption of Baby Boy L, 231 Kan. 199, 643 P.2d 168 at 175 (1982); In the Interest of S.A.M., 703 S.W.2d 603 at 608 (Mo.App.1986).

7. Jeff Nothelphim and members of his extended family have never been an "Indian Family" to Baby Boy Davis nor have they even made any effort to create such relationship to Baby Boy Davis or any of the other children of Jeff Nothelphim. "The underlying thread that runs though (sic) the entire Act to the effect that the Act is concerned with removal of Indian children from an existing Indian family unit and the resultant breakup of the Indian family. [T]o apply the Act to the factual situation such as the one before us wold (sic) be to violate the policy and intent of Congress rather than uphold them." Baby Boy L, supra at 175; Interest of S.A.M., supra at 608.

8. Neither the Oglala Sioux Tribe nor the extended family of Baby Boy Davis have ever sought to create or maintain an Indian Family or impart the Oglala Sioux Cultural heritage to Tyler, Nicholas or Ryan Nothelphim since the divorce of their mother from Jeff Nothelphim.

9. Grounds for termination of the parent-child relationship must be proven by clear and convincing evidence. I.C. Sec. 16-2009.

10. There is clear and convincing evidence that Jeff Nothelphim has abandoned Baby Boy Davis by having failed to maintain a normal parental relationship with Baby Boy Davis, by failing to provide reasonable support, failing to maintain regular personal contact and

failing to express any desire whatsoever to do so in the future.

11. There is clear and convincing evidence that it would be in the best interest of Baby Boy Davis and Jeff Nothelphim that the parental rights of Jeff Nothelphim to Baby Boy Davis be terminated.

ORDER

IT IS ORDERED AND THIS DOES HEREBY ORDER That the parent and child relationship existing between Baby Boy Davis and Jeff Nothelphim is hereby terminated.

Dated this 7th day of June, 1990.

Gary D. DeMeyer
Magistrate Judge

I HEREBY CERTIFY that true and correct copies of the above foregoing Findings of Fact, Conclusions of Law and Order were mailed to the following, on or about the 7th day of June, 1990.

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Dated this 7th day of June, 1990.

MM
Deputy Clerk